

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTONIO MURO LAMAS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. C08-5224BHS
(C04-5680JET
CR02-5400BHS)

ORDER TRANSFERRING
CASE AS SECOND OR
SUCCESSIVE PETITION

This matter comes before the Court on Petitioner's Motion to Set Aside Sentence/Conviction Pursuant to 28 U.S.C. § 2255 (Dkt. 1). The Court has considered the motion and the remainder of the file and hereby transfers the motion to the United States Court of Appeals for the Ninth Circuit for the reasons stated herein.

I. PROCEDURAL BACKGROUND

On April 26, 2002, Mr. Muro Lamas pleaded guilty to a one-count information charging him with distribution of methamphetamine in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B). Dkt. 1-2. At the sentencing hearing on October 4, 2002, the Court determined that the total offense level was 26 and that Petitioner's criminal history placed him in category III. CR02-5400, Dkt. 35 at 2, 15. The Court found the resulting sentencing guideline range to be 78-97 months. *Id.* at 2. The parties agreed that Mr. Muro Lamas should receive credit for time served in a state facility. *Id.* at 4, 37.

The Government recommended that Mr. Muro Lamas be sentenced to 97 months with credit for time served. Under the Government's recommendation, the Bureau of Prisons would be responsible for calculation of the four months Mr. Muro Lamas served in a state facility. Mr. Muro Lamas recommended that the Court take the four months into account and sentence Mr. Muro Lamas to 93 months. *Id.* at 4. Such a sentence would not rely on the Bureau of Prisons to calculate the length of time served in a state facility. The Court ultimately sentenced Mr. Muro Lamas to 93 months, imposed no fine, and required him to pay a special assessment of \$100. Dkt. 1-2.

On October 12, 2004, Mr. Muro Lamas filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. *Muro Lamas v. United States*, C04-5680JET Dkt. 1. On February 14, 2005, the Court denied the motion on its merits. C04-5680, Dkt. 11.

On April 7, 2008, Petitioner filed a Motion to Correct Judgment pursuant to Federal Rule of Criminal Procedure 36, contending that the judgment's lack of any reference to time served constituted a clerical error. Dkt. 1. As indicated above, Mr. Muro Lamas's time served in a state facility was taken into account when Mr. Muro Lamas was sentenced to 93 months rather than 97 months. Mr. Muro Lamas's Motion to Correct Judgment was therefore construed as a Motion to Set Aside Sentence/Conviction pursuant to 28 U.S.C. § 2255, and a new civil case was opened.

II. DISCUSSION

A second or successive motion under 28 U.S.C. § 2255 must be certified by the United States Court of Appeals for the Ninth Circuit to contain one of the following:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

1 28 U.S.C. § 2255(h). This motion is Mr. Muro Lamas's second post-conviction challenge
2 to his 2002 conviction. As such, it is a second or successive motion under 28 U.S.C. §
3 2255 and subject to the requirement that Mr. Muro Lamas obtain an order from the Ninth
4 Circuit authorizing this Court's review of the motion.

5 **III. ORDER**

6 Therefore, it is hereby

7 **ORDERED** that this case is **TRANSFERRED** to the United States Court of
8 Appeals for the Ninth Circuit as a second or successive petition, and the Clerk of Court
9 shall enter a statistical termination of this case.

10 DATED this 21st day of April, 2008.

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14 BENJAMIN H. SETTLE
United States District Judge